FILED

97-363 MAY 27 1997

NO.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CAMILLE FORD,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES O. BROCCOLETTI
ZOBY & BROCCOLETTI, P.C.
6663 Stoney Point South
Norfolk, VA 23502
(757) 466-0750

Attorney for Petitioner

Brief Printing Specialists, Inc., 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-0700

68 pp

QUESTIONS PRESENTED FOR REVIEW

1. The trial court found that Ford did not know that she was transporting crack cocaine as opposed to powder cocaine. Yet, the trial court determined that Ford knew the quantity of cocaine she was transporting. Did the trial court err in making that finding?

2. The trial court admitted into evidence various acts of violence committed by others in the conspiracy. These acts were admitted to show the parties knew each other and socialized together. Did the trial court err in admitting that evidence as it was so prejudicial and there were less offensive ways to introduce it?

3. During the closing argument the U.S. Attorney said the role of the defense attorneys was to mislead and confuse the jury. The trial court overruled the objection

and a motion for a mistrial. Did the trial court err in overruling the motion when the comment underminded the fairness of the trial?

LISTINGS OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

1. The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit are the same as the parties who appear in the caption of this case.

TABLE OF CONTENTS

Questions Presented for Review	ii
Listing of All Parties To The Proceeding in the Court Whose Judgment is Sought to be Reviewed	iv
Table of Contents	v
Table of Authorities	vii
Petition for Writ of Certiorari	2
List of Official and Unofficial Reports of Opinions Delivered By Other Courts	3
Statement of Grounds on Which the Jurisdiction of the Supreme Court is Involved	4
Statement of the Case Containing the Facts Material to the Consideration of the Questions Presented	5
Argument Amplifying the Reasons Relied on for the Allowance of the Writ	10

The Amount of Drugs Attributed to the Defendant Ford by the Court at Sentencing was Clearly Erroneous 10

The Trial Court Erred in Aliowing into Evidence Acts of Violence Committed by Witnesses Which Were Not in Furtherance of the Conspiracy 15

The District Court Erred in Overruling Objections to the Prosecutor's Grossly Improper Closing Argument that Undermined the Fairness of the Trial and Denied Defendant's Due Process of Law 27

Conclusion 37

Appendix a

TABLE OF AUTHORITIES

CASES

Berger v. U.S., 295 U.S. 78 (1935)	30
Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983)	35
Chapman v. California, 386 U.S. 18 (1967)	36
Greenberg v. U.S., 280 F.2d 472 (1st Cir. 1990)	30
Miller v. Pate, 386 U.S. 1 (1967)	32
Rawle, 845 F.2d at 1247 n.3	17
Sizemore v. Fletcher, 921 F.2d 667 (6th Cir. 1990)	29 36
State v. Caveness, 78 N.C. 484 (1878)	29
U.S. v. Bradley, 5 F.3d 1317 (4th Cir. 1993)	24
U.S. v. Cantu, 876 F.2d 1134 (5th Cir. 1989)	31
U.S. v. Chorman, 910, F.2d 102 (4th Cir. 1990)	29
U.S. v. Friedman, 909 F.2d 705 (2nd Cir. 1990)	28, 36

U.S. v. Goff, 907 F.2d 1441, 1444 (4th Cir. 1990) 10

U.S. v. Gordon, 987 F.2d 902 (2nd Cir. 1993) 11, 25

U.S. v. Greenwood, 796 F.2d 49 (4th Cir. 1986) 23

U.S. v. Hernandez, 975 F.2d 1035 (4th Cir. 1992) 16 23

U.S. v. McDonald, 620 F.2d 559, 564 (5th Cir. 1990) 30

U.S. v. McManus, 23 F.3d 878 (4th Cir. 1994) 10

U.S. v. Racksman, 7 F.3d 1476 (10th Cir. 1993) 24

U.S. v. Turquitt, 557 F.2d 464 (5th Cir 1997) 25

U.S. v. Universita, 298 F.2d 365 (2nd Cir.) 33

U.S. v. Uwaeme, 975 F.2d 1016 (4th Cir. 1992) 11

U.S. v. Valentine, 82 F. 2d 565 (2nd Cir. 1987) 27

U.S. v. Williams, 985 F.2d 634 (1st Cir. 1992) 24

U.S. v. Young, 470 U.S. 1 (1985) 35

STATUTES

28United Sates Code § 1254 (1) 4

18 United States Code § 3231 8

FEDERAL RULES

Federal Rules of Evidence 401 17

Federal Rules of Evidence 402 17

Federal Rules of Evidence 403 20, 21, 23

Federal Rules of Evidence 404 21, 23

Federal Rules of Evidence 801 (D)(2)(E) 25

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

CAMILLE FORD,

Petitioner/Appellant,

V.

UNITED STATES OF AMERICA

Respondent/Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice and The Associate Justices Of The Supreme Court.

Camille Ford, by counsel, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals For the Fourth Circuit in this case

LIST OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY OTHER COURTS

1. Order of the United States District Court, Eastern District of Virginia, Norfolk Division, dated July 31, 1995.
2. Unpublished opinion by the United States Court of Appeals for the Fourth Circuit, decided February 26,

1997, affirming the Order the United States District Court, Eastern District of Virginia, Norfolk Division.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOLVED

1. The United States Court of Appeals for the Fourth Circuit decided this case on February 26, 1997. This court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Between 1989 and 1994, Robert Gillins established and operated a drug trafficking enterprise based principally in New York City, with distribution points in various cities in the eastern United States. His brother-in-law, Samuel Kelly, operated a drug trafficking enterprise in the Richmond area. The operations of both grew, expanded and prospered in 1991 and 1992, then merged together in 1993. Gillins, Kelly, and Paul Ebanks (the third co-organizer for operations in Norfolk, Virginia) recruited other associates in New York. The enterprise employed distributors, bodyguards, enforcers, and couriers for it's crack cocaine distribution operations. The merger led to further escalation. At it height, the enterprise obtained approximately twenty (20) kilograms of cocaine per week, which was cooked and distributed in eastern Virginia; Philadelphia; Baltimore; Charlotte, North

Carolina; and Columbia, South Carolina.

Petitioner Camille Ford testified on her own behalf. She admitted taking cars back and forth from the Tidewater area of Virginia to New York from time to time, but denied any actual knowledge that drugs or money were being transported. She acknowledged that the various people she knew who testified for the government against her seemed to have easy money, but was never present for the loading or unloading of the vehicles she drove and was unaware of their contents. The government conceded that there was no evidence that she knew the nature of the drugs she transported. Therefore, she was held accountable for powder cocaine rather than crack cocaine. However, she was sentenced for amounts attributed to her through the testimony of others having actual knowledge of them.

During the government's rebuttal argument, the prosecutor made two improper arguments, which were objected to by the Defendants. First, she stated to the jury that a witness cannot be impeached by information which the witness failed to give to the grand jury or failed to give to a law enforcement officer during a debriefing. Second, she argued to the jury that defense counsel's responsibility to each of their clients was to mislead and confuse the jury. The trial court overruled the objection, thus conveying to the jury the court approval of the prosecutor's comments.

The trial court's jurisdiction was pursuant to 18 U.S.C. Section 3231. Petitioner was found guilty of participating in the conspiracy and sentenced at a level according to the amount of thirty-one kilograms of cocaine. She and other co-defendants appealed to the

United States Court of Appeals for the Fourth Circuit, which affirmed the convictions by an unpublished per curiam opinion This petition follows.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

THE AMOUNT OF DRUGS ATTRIBUTED TO THE DEFENDANT FORD BY THE COURT AT SENTENCING WAS CLEARLY ERRONEOUS

The government bears the burden of proof for determining the quantity of drugs used for sentencing. U.S. v. Goff, 907 F. 2d 1441, 1444 (4th Cir. 1990). Upon objection by Ford, the government was required to provide the trial court with sufficient evidence to prove the quantities alleged in the presentence report. U.S. v.

McManus, 23 F.3d 878, 885 (4th Cir. 1994). In that instance, the government failed to produce any evidence that Petitioner had any knowledge whatsoever of the quantities she is alleged to have transported.

In arguing for a sentence enhancement, the government must offer more than mere "conclusory statements" to support its argument. U.S. v. Gordon , 893 F.2d 932, 936 (4th Cir. 1990). The evidence must have "sufficient indicia of reliability to support its probable accuracy". U.S. v. Uwaeme, 975 F.2d 1016, 1021 (4th Cir. 1992). In this case, the district court did not hold the government to their burden of proof.

The government's position was that because other couriers for the conspiracy, namely Maritza Bueno, Daphne Hayes and Renee Lee, made similar trips and knew that they were transporting illegal drugs, the same

knowledge should be imputed to Ford. However, none of the witnesses testified that Ford had any actual knowledge concerning the nature or amounts of cocaine in the vehicle. To the contrary, it is undisputed that she was never present for any loading or unloading of drugs which may have been in any vehicle. The district court acknowledged that she "never saw the drugs loaded, never saw the drugs unloaded, and ... did not know how much was in the vehicle. I will give you all three of these points."

Because the government conceded that there was no evidence to establish that Petitioner was aware of the nature of the cocaine allegedly transported, the amounts attributed to her were for powder rather than crack cocaine. By the same logic, the government could not establish that Ford was aware of the amounts allegedly

transported. She never saw any cocaine. The minimum amount of five kilograms should have been attributed to her instead of thirty-one kilograms of which only other persons were shown to have had knowledge.

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE ACTS OF VIOLENCE COMMITTED BY WITNESSES WHICH WERE NOT IN FURTHERANCE OF THE CONSPIRACY

Early in the trial, the defendants moved to strike the testimony of the witness Paul Ebanks and for the court to instruct the jury to disregard it. This testimony involved three acts of violence to which Ebanks testified: an incident at "Greekfest" which occurred in July of 1992, in Philadelphia; an incident in New York at a nightclub; and an incident during Spring of 1993, in Baltimore.

These incidents were sufficiently violent and

troubling that they caused a sitting juror to become so distraught and nauseous she had to be excluded for cause as too physically ill to continue her duties.

In addition, counsel for Kelly moved the court to order the same relief as a result of the testimony of the witness Ebanks, and the expected testimony of the witness Terrance James, regarding his killing of Gregory Woodward, a.k.a. Shorty. Both objections were overruled, and the evidence admitted.

The district court erroneously admitted this testimony, over defendants' objections as proof of a relationship between various defendants and to show their ability to remember past events.

The need to prove this relationship was minimal and the probative force for this purpose was exceedingly small. Given the substantial likelihood that this virtually

irrelevant evidence would unfairly prejudice defendant with this jury, it should have been excluded. E.g. U.S. v. Hernandez, 975 F.2d 1035 (4th Cir. 1992). Because this error unfairly prejudiced Ford, she must receive a new trial.

The challenged testimony is irrelevant. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 401. Evidence which is not relevant is not admissible. Fed. R. Evid. 402. For the evidence to be relevant, it must be sufficiently related to the charged offense. Rawle, 845 F.2d at 1247 n.3.

In essence, the determination of the relevancy of a particular item of evidence centers around how the specific piece of evidence alters the probability of the

existence of a consequential fact.

Ebanks testified that in July of 1992, the "members of the organization" got together in Philadelphia. A Greek picnic was held every year at that time, hence the name "Greekfest". Robert Gillins owned a Lexus which was stolen. As a result, Gillins asked for weapons to be transported from Virginia to Philadelphia. Purely by coincidence, some of the group got involved in a confrontation. As Ebanks described it, "there was trade off of shots" (App. 225). No one was killed in the shoot out.

Next, the government elicited testimony from Ebanks that on New Years Eve in 1992, at a club in New York, an altercation ensued outside club. Shots were fired and everybody dispersed. No one was injured (App. 231-233). The shots did not further the conspiracy.

Finally, Ebanks testified about a get together in Baltimore during the Spring of 1993. After a night of revelry, the group went to a pancake house. Again, another altercation broke out between Gillins and some unrelated persons. Gunfire broke out between them, no one was injured. (App. 235-237). The conspiracy was not furthered.

Ebanks also described the hearsay version of the killing of Gregory Woodward, a.k.a. Shorty, by Terrance James. Woodward was with Ivan Gibson, a.k.a. Sonny, when he was shot and killed in Washington, D.C. James felt threatened by Woodward's presence and suspicious of Woodward's story, so James killed Woodward. (App. 212). Defendants objected to their testimony and the expected testimony of James objected to at the time of the motion to strike. The court overruled saying although

Ebanks said Woodward's death had nothing to do with the conspiracy, James might say something else. (App. 386).

James later testified about the killing of Woodward. He admitted doing so because he did not believe Woodward's version of the events and was suspicious of him. He also felt Woodward may have been reaching for a gun, so he shot Woodward first. Woodward's killing had nothing to do with the conspiracy and James' testimony did not fulfill the prediction of the trial court. (App. 869-872).

In all circumstances, counsel objected to the acts of violence, shootings, and killings detailed on the basis that they were not acts taken in furtherance of the conspiracy. These were random acts of violence not probative of any material fact, and unduly prejudicial. They should have been stricken from the record. See Fed. R. Evid. 403. The

court overruled the motion holding the shootings were indicia of criminal activity and criminal organizations. The evidence bolstered the credibility of Ebanks, who was able to recall such events. (App 389-390) The testimony stood. The ruling was erroneous and requires reversal.

The courts have long considered such evidence and the prejudicial impact it has on a trial. Federal courts operate under the standards set forth in Rules 403 and 404 (B) when considering the admissibility of such evidence of other crimes. Rule 403, requires a court to balance the possible prejudice inherent in such evidence against its probative value. Clearly evidence of shootings, killings, and random acts of violence are prejudicial.

This notion is dramatically illustrative by the violent reaction of one of the jurors to the graphic testimony, which required the juror to be excluded

because of illness.

The court held that the evidence was probative because it demonstrated (A) the existence of the conspiracy because the members of the group got together on several occasions and (B) that the witness Ebanks has a vivid memory and could recall these events so his testimony on other issues is more credible. These were not matters of any logical relevance to the government's case. The prejudice inherent in the evidence of extreme violence outweighs its usefulness.

Even more, the testimony of Ebanks (and later Terrance James) regarding the killing of Gregory Woodward bore no relationship to this case at all. James was alone when he shot Woodward. No other group members were present. It was not part of their conspiracy. It did nothing to demonstrate James' powers of

recollection. It was simply, without any relevance.

Even if the challenged testimony is minimally relevant to some material issue, it is still inadmissable if its probative value is outweighed by dangers of unfair prejudice. Fed. R. Evid. 403. This rule protects against the use of that, although relevant, may unfairly trigger "jury emotionalism or irrationality." U.S. v. Greenwood, 796 F2d. 49, 53 (4th Cir. 1986). In applying Rule 403 to otherwise relevant evidence, the district court should balance the prejudice the testimony will cause against its probative value. Hernandez, 975 F2d. at 1041.

The Court also determined that drug conspiracies are necessarily violent and so evidence of violence, inherent in any conspiracy, would be admissible. This showing of propensity alone is the precise harm that Rule 404 (B) addresses and seeks to exclude. "Evidence of

other crimes is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Substitute "conspiracy" for "person" and it is clear that the Court's reasoning is incorrect.

A four part balancing is applied to determine admissibility under Rule 404(B). Specifically, (l), the evidence must be offered for a proper (not for character) purpose; (2), the evidence must be relevant for that purpose; (3), the court must make a Rule 403 balancing determination; (4), upon request , a proper limiting instruction must be given. U.S. v. Racksman, 7 F.3d. 1476, 1479 (10th Cir. 1993). The more heinous the acts sought to be introduced, the more likely the jury will be to misuse the evidence and treat the defendants as generally bad people, which is the harm the rule seeks to prohibit. U.S. v. Williams, 985 F2d. 634 (lst Cir. 1992); U.S. v.

Bradley 5 F. 3d 1317 (4th Cir. 1993). The evidence's prejudicial effect is obvious and its importance to the government's case as a whole was minimal at best. As such the rule required its exclusion. U.S. v. Gordon, 987 F2d.. 902 (2nd Cir. 1993).

The trial court must determine whether the import of the evidence, its reason for admission, can be proved in other non-prejudicial ways. U.S. v. Turquitt, 557 F2d., 464 (5th Cir. 1997). The harm caused by admitting such prejudicial evidence could have been easily avoided. Ebanks could have left out the shootings. His detailed testimony on other issues, such as his note books with names, provided ample corroboration of his ability to recall.

THE DISTRICT COURT ERRED IN OVERRULING OBJECTIONS TO THE PROSECUTOR'S GROSSLY IMPROPER CLOSING ARGUMENT

THAT UNDERMINED THE FAIRNESS OF THE TRIAL AND DENIED DEFENDANTS DUE PROCESS OF LAW.

During her rebuttal argument, which was the last address by counsel to the jury, the prosecutor made two improper arguments. First, she misled the jury by stating a witness cannot be impeached by information the witness failed to give to the grand jury or a law enforcement officer during a debriefing. This comment, aside from being an improper opinion of the prosecutor, involved matters not in evidence before the jury. The mischaracterization of grand jury testimony by a prosecutor constitutes reversible error. U.S. v. Valentine, 82 F2d. 565,-570-71 (2nd Cir. 1987). Second, the prosecutor improperly argued defense counsel had a responsibility to mislead or confuse the jury (App. 1402-1403).

Reversible error occurs when a prosecutor argues "defense counsel will make any argument he can to get the guy off" because it risks seriously distorting the jury's understanding of the role of both the prosecutor and defense counsel. U.S. v. Friedman, 909 F2d. 705, 709 (2nd Cir. 1990).

Defendants objected to both of these improper arguments, but the District Court improperly overruled these objections. When a trial court overrules objections to improper arguments, the prejudice of those comments is exacerbated. "They were spoken in the presence of the presiding judge, and of not being corrected by [her]. They came to the jury with the impression of [her] assent and approbation." State v. Caveness, 78 N.C. 484, 490 (1878); accord Sizemore v. Fletcher, 921 F.2d. 667 (6th Cir. 1990) (failure to caution jury not only fails to cure error, but

contributes to impression that comments denigrating defense counsel are accurate, appropriate, and worthy of belief). Reversible error occurs when a prosecutor makes improper remarks that prejudicially affect defendants' substantial rights. U.S. v. Chorman, 910 F.2d. 102, 103 (4th Cir. 1990).

Comments regarding the exercise of constitutional rights are prohibited because they affect defendants' substantial rights. A prosecutor may not "suggest to the jury that a defendant hires an attorney in order to generate an alibi, 'take [care] of everything' or 'get [his] story straight.' Such statements strike at the core of the right to counsel, and must not be permitted." Sizemore, 921 F.2d. at 671. "Comments that penalize a defendant for the exercise of his right to counsel and that also strike at the core of his defense cannot be considered harmless error.

Berger v. U.S., 295 U.S. 78, 88 (1935). The right to counsel is so basic to all other rights that it must be accorded very careful treatment." U.S. v. McDonald, 620 F.2d. 559, 564 (5th Cir. 1990).

The defense relied heavily on these omissions in an effort to challenge the credibility of the numerous jailhouse informants proffered by the government in this case. This argument by the prosecutor amounted to the expression of a personal opinion concerning the credibility of witnesses. See U.S. v . Cantu, 876 F.2d. 1134 (5th Cir. 1989).

The challenged argument occurred in this way. At the beginning of her rebuttal, the prosecutor argued:

> For example, you heard a number of the defense attorneys using cross-examination of the government witnesses

referring to their grand jury transcripts and saying, but you didn't tell that to the grand jury.
Well, keep in mind that the grand jury presentation of their testimony is a condensed version of the debriefing process, and it is entirely possible, if not probable --

[Counsel]: Judge, I object to that. I think that it is improper.

The Court: Overruled.

[Prosecutor]: -- that the question was not asked of the witness when he appeared before the grand jury, or the question was not even asked perhaps when he was debriefed initially. So witnesses not impeached if he did not tell the information to the grand jury on a previous occasion.

(A.P. 3128)

Here, the prosecutor plainly expressed a personal opinion that certain questions were omitted either by the prosecutor in the grand jury testimony or by a law enforcement officer during a debriefing. Due process is violated when a prosecutor misrepresents the nature of nontestimonial evidence. Miller v. Pate, 386 U.S. 1, 6-7 (1967). "The prosecutor has a special duty not to mislead; the government should, of course, never make affirmative statements contrary to what it knows to be the truth." U.S. v. Universita, 298 F.2d. 365, 367 (2nd Cir.), cert. Denied, 370 U.S. 950 (1962).

This argument was improper and prejudicial. The prejudicial effect stemmed not only from the district court's assent and approbation to it by overruling defendant's objection, but also because it struck at the core of the defense. Defendants relied almost exclusively on

vigorous and thorough cross-examination of the government's informants, each of whom received substantial, preferential treatment in exchange for their trial testimony. A significant feature of this impeachment included critical omissions from the grand jury testimony of these witnesses and their statements to law enforcement officers. These omissions demonstrated the unreliability of their trial testimony because critical facts adverse to defendants were added; facts not included in grand jury testimony or pretrial statements. An argument suggesting a witness could not be impeached in this fashion was highly improper. Furthermore, the prosecutor assured the jury, without any evidential support, that these matters were simply not addressed during the grand jury testimony or debriefing process based on tactical decisions of the government. Nothing supported this argument. It must

not be condoned.

Near the end of her rebuttal, the prosecutor returned to prejudicially improper argument. She stated:

> Each of these eight defendants is represented by an attorney. That attorney's job is to represent the interests of his particular client. If his client's interests are served by trying to mislead or confuse --
>
> [Counsel]: Judge, I object to that.
>
> [Counsel]: Objection
>
> THE COURT: Overruled. It is argument.
> [Prosecutor]: --within the limits of the law, that is his job, and that is what he is going to do.

(A.P. 1402)

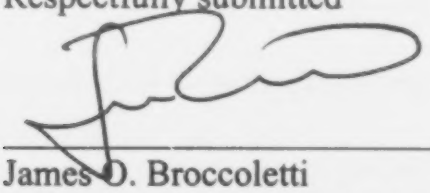
It is highly improper for a prosecutor to argue defense counsel's responsibility is to distort the facts. For

example, reversible error occurred where a prosecutor argued "all defense counsel in criminal cases are retained solely to lie and distort the facts and camouflage the truth in an abominable attempt to confuse the jury as to their clients involvement with the alleged crimes." Bruno v. Rushen, 721 F2d. 1193, 1194-95 (9th Cir. 1983). See U.S. v. Young, 470 U.S. 1 (1985) (requiring prompt and emphatic curative instructions to the jury when a prosecutor makes improper comments). As in Friedman and Sizemore, the Court's action in overruling these objections contributed to the impression that comments denigrating defense counsel were accurate and appropriate.

CONCLUSION

For the reasons stated, your petitioner prays that the Court will grant this Petition for Writ of Certiorari.

Respectfully submitted



James O. Broccoletti
ZOBY & BROCCOLETTI,PC
6663 Stoney Point South
Norfolk, Virginia 23502
(804) 466-0750

Attorney for
Petitioner/Appellant

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CAMILLE FORD,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JAMES O. BROCCOLETTI
ZOBY & BROCCOLETTI, P.C.
6663 Stoney Point South
Norfolk, VA 23502
(757) 466-0750

Attorney for Petitioner

Brief Printing Specialists, Inc., 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-0700

APPENDIX

A. Unpublished opinion by the United States Court of Appeals for the Fourth Circuit dated May 31, 1994.

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States of America,	)
Plaintiff-Appellee,	)
v.	)No. 95-5631
Samuel Benjamin Kelly, a/k/a/ Tiz,	)
Defendant-Appellant	)
United States of America,	)
Plaintiff-Appellee,	)
v.	)No. 95-5632
John Austin Edwards, a/k/a/	)
Doquan Cooper, a/k/a/ Shakim,	)
Defendant-Appellant	)
United States of America,	)
Plaintiff -Appellee,	)
v.	)No. 95-5633
Jeffrey Maillard, a/k/a/ Spice,	)
Defendant-Appellant	)
United States of America,	)
Plaintiff-Appellee,	)
v.	)No. 95-5634
Camille Ford,	)
Defendant-Appellant.	)
United States of America	)

Plaintiff-Appellee,	)
v.	)No. 95-5635
Anthony Merrick, a/k/a/ C.,	)
Defendant-Appellant.	)
	)
United States of America,	)
Plaintiff-Appelle,	)
v.	)No. 95-5636
Morris Eugene Hayes, a/k/a/ Easy,	)
Defendant-Apellant.	)

Appeals from the United States District court
for the Eastern District of Virginia, at Norfolk
Rebecca B. Smith, District Judge.
(CR-94-163)

Argued: November 1, 1996

Decided: February 26, 1997

Before HALL and LUTTIG, Circuit Judges, and
THORNBURG,
United States District Judge for the Western District
of North Carolina, sitting by designation

Affirmed by unpublished per curiam opinion

COUNSEL

ARGUED: Sa'ad El-Amin, EL-AMIN & CRAWFORD, Richmond,Virginia; James O. Broccoletti, ZOBY & BROCCOLETTI, Norfolk,Virginia; Melvin J. Radin, Norfolk, Virginia, for Appellants.
Laura Pellatiro Tayman, Assistant United States Attorney, Norfolk, Virginia, for Appellee. ON BRIEF: Cary B. Bowen, BOWEN & BOWEN, for Appellant Hayes; Milton B. Widenhouse, Jr., FEDERAL PUBLIC DEFENDER'S OFFICE, Raleigh, North Carolina, for Appellant Merrick; Kenneth Bruce Willis, Norfolk, Virginia, for Appellant Maillard, Helen F. Fahey, United States Attorney, Norfolk, Virginia for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Between 1989 and 1994, Robert Gillins established and operated a drug trafficking enterprise based principally in New York City with distribution points in various cities in the eastern United States. Gillins'

brother-in-law, appellant Samuel Kelly, operated a drug trafficking enterprise in Richmond, Virginia, which merged with Gillins' enterprise in 1993. Appellant Jeffrey Maillard managed Gillins' drug operations in Philadelphia, Pennsylvania. Gillins, Kelly, and Paul Ebanks (coorganizer for the enterprise's operations in Norfolk, Virginia) recruited associates in New York City to work as distributors, body guards, enforcers and couriers for the enterprise's crack cocaine distribution. The record establishes that the enterprise obtained approximately 20 kilograms of cocaine per week, to be cooked into crack cocaine and distributed by the organization in the Tidewater and Richmond areas of Virginia; Philadelphia; Baltimore; Charlotte; and Columbia, South Carolina. J. A. At 894-95. The record also evidences the enterprise's fondness for weaponry and

propensity for violence.

On December 2, 1994, a federal grand jury in Norfolk indicted 21 defendants for conspiracy to distribute crack cocaine and cocaine and related offenses. Appellant Samuel Kelly was charged with conspiracy to distribute crack cocaine and cocaine, operating a continuing criminal enterprise, possession with intent to distribute two kilograms of crack cocaine, and conspiracy to commit money laundering. Appellants John Edwards, Jeffrey Maillard, Camille Ford, Anthony Merrick and Morris Eugene Hayes were each charged with conspiracy to distribute crack cocaine and cocaine. Several of the other defendants, including Robert Gillins, pleaded guilty to various offenses and agreed to cooperate with the government.

At the conclusion of the trial, the jury returned a

verdict finding Samuel Kelly, John Edwards, Jeffrey Maillard, Camille Ford, Anthony Merick and Morris Eugene Hayes guilty of conspiracy to distribute crack cocaine and cocaine. Samuel Kelly was also found guilty of operating a continuing criminal enterprise and conspiracy to commit money laundering, but found not guilty of possession with the intent to distribute two kilograms of crack cocaine. Two other defendants, Alfred Cleveland and James Cousins, were found not guilty by the jury.

Appellants raise thirteen arguments challenging their convictions, none of which is meritorious.

1.

During voir dire, prospective juror Samuel Bracey indicated that his son had been prosecuted for conspiracy.

Although Bracey stated that he thought that he could decide the case fairly, he also declared that he thought the law of conspiracy was unfair and admitted that he felt hostility toward the court because his son's probation had been revoked. J.A. at 147-49. Judge Smith removed Bracey for cause.

A district court's determination to excuse a juror for cause is entitled to "special deference." Patton v. Yount, 467 U.S., 1025, 1038 (1984). The district court conducted a particularized inquiry into Bracey's ability to serve impartially and correctly excused Bracey because of Bracey's stated hostility toward the court in question regarding the very law to be applied in this case.

II.

Appellants argue that government agents' notes

from the debriefing of Paul Ebanks constituted Jencks Act "statements" that had to be produced upon request. The Jencks Act defines "statement" in relevant part as "a written statement made by said witness and signed or otherwise adopted or approved by him." 18 U.S.C. § 3500 (e)(1). The agents' notes were not transcriptions, nor were they approved by Ebanks. Rather, the agents merely asked follow-up questions for clarification or to ensure that their notes were correct. Ebanks himself testified to that effect: "Like I talk street, and I mean they would have to ask it back to me sometimes, though, to make sure I had the proper -- they had the proper language, the proper communication, I might say something in the street, and they wouldn't understand, and they would ask it back to me." J.A. at 371.

The agents' request for clarification, even when

met with confirmation from Ebanks, cannot be classified as adoption or approval of a statement. As this court has recently stated, "a government agent's interview notes that 'merely select [ ] portions, albeit accurately, from a lengthy oral recital' do not satisfy the Jencks Act's requirement of a 'substantially verbatim recital.'" United States v. Roseboro, 87 F.3d 642, 645 (4th Cir. 1996), quoting Palmero v. United States, 360 U.S. 343, 352 (1959). Furthermore, even if the notes did constitute a "substantially verbatim recital." they did not become the witness' statement unless the witness read them or the agent read them to him. Id. This requirement is not satisfied where, as here, the agent only read back occasional excerpts for clarification. Therefore, the district court did not err in concluding that the notes were not producible as Jenks Act material.

III.

Appellants also argue that the district court erred in overruling their objections to the prosecution's closing argument rebuttal.

During trial, defense counsel cross-examined government witnesses regarding alleged omissions in their grand jury testimony and debriefing statements and later commented on these alleged omissions during closing arguments. In response, the prosecution stated during rebuttal that "a witness is not impeached if a question was not previously asked." J.A. at 1382. The prosecution continued by urging the jury to "keep in mind that the grand jury presentation of their testimony is a condensed version of the debriefing process, and it is entirely possible, if not probable... that the question was not asked of the witness when he appeared before the grand jury, or

the question was not even asked perhaps when he was debriefed initially." J.A. at 1382-83. Defendants argue that these comments constituted improper opinion and involved matters not in evidence before the jury. However, these responses to the defense attorneys' arguments were appropriate commentary upon the absence of contradictory or inconsistent prior statements by government witnesses.

Defendants also argue that it was improper for the prosecutor to note during closing argument that each of the eight defendants was represented by an attorney, and that if the "client's interests are served by trying to mislead or confuse ... within the limits of the law, that is [the attorney's] job, and that is what he is going to do." J.A. at 1402. Defendants argue that this comment violated due process and punished defendants for exercising their

right to counsel. Even assuming that this comment constituted error, such error clearly did not "so prejudice [ ]) the trial process as to require reversal ." United States v. Harrison, 716 F.2d 1050, 1051 (4th Cir. 1983). This court's test for such prejudice consists of four factors:

(1) The degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Id at 1052. Each of these four factors weighs heavily against a finding of prejudice.

Therefore, the district court did not commit reversible error in overruling defendants' objections to the

prosecution's closing argument rebuttal.

IV.

Appellants object to the district court's admission of evidence regarding: (l) the February 1992 murder of Gregory Woodward; (2) a meeting called by Robert Gillins, in July 1992 in Philadelphia; (3) a meeting of the co-conspirators on New Years Eve of l992 in New York City; (4) a meeting of the co-conspirators in Spring of 1993 in Baltimore; and (5) evidence that Robert Gillins had threatened Anthony Moore, a government witness. Each of the first four incidents is relevant and probative to establishing the existence of conspiracy between the defendants and others to violate the federal narcotics laws, and to establishing the elements of the continuing criminal enterprise charged in Count Two. The fifth, evidence that

Robert Gillins had threatened a government witness, was relevant to the witness' credibility. The admission of the testimony in question certainly did not constitute a "clear abuse of discretion" requiring reversal. United States v. Russell, 971 F.2d 1098, 1104 (4th Cir. 1992).

V.

Appellants John Edwards and Jeffrey Maillard argue that the evidence was insufficient to support their convictions for conspiracy to distribute narcotics. Under United States v. Brooks, 957 F.2d 1138 (4th Cir. 1992):

> Once it has been shown that a conspiracy exists, the evidence need only establish a slight connection between the defendant and the conspiracy to support conviction. A defendant need not have knowledge of his coconspirator, or knowledge of

the details of the conspiracy. And a defendant may be convicted despite having played a minor role in the overall conspiracy.

Id. At 1147. Coupled with this broad definition of conspiracy is the very deferential standard of review for sufficiency of the evidence claims. The question on appeal is "whether, viewing the evidence in the light most favorable to the government, any rational trier of facts could have found the defendant[s] guilty beyond a reasonable doubt." United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir. 1982). This standard is easily met with regard to both Edwards and Maillard.

The abundant evidence against the two men need not be recited in full. Representative of the evidence against Edwards is that Ebanks testified that Ivan Gibson asked Edwards "if he could sell some drugs down there [in

Ohio], and [Edwards] said it was okay, there was no problem". J.A. at 188. Similarly, representative of the evidence against Maillard is the testimony that Maillard provided false identification documents for Paul Ebanks, Robert Gillins, and Pete Johnson, J.A. at 592-93, and the testimony that William Lisby and Terrance James delivered Kilogram quantities of crack cocaine to Maillard for the Philadelphia operation, J.A. at 682-84, 880.

VI.

Appellants offer a bevy of additional arguments, none of which is meritorious.

Appellants argue that the district court effectively directed a verdict against them by telling the jury that the defendants should be found guilty of conspiracy if they sold drugs for profit. This argument fails because the court actually responded to the jury's question regarding

whether a buyer is part of a conspiracy if he sells drugs for profit by telling the jury that such a buyer is part of a conspiracy "provided the elements of instruction 20 are met." J.A. at 1432. Therefore, the district court did not, as appellants argue, tell the jury that selling drugs for profit is sufficient for a conspiracy conviction.

Appellant Ford challenges the amount of drugs which the district court attributed to her. However, it was not clearly erroneous for the district court to conclude, "based upon the trial testimony, [the district court's] review of [its] notes, and in particular Mr. Lisby and Mr. Wilmot's testimony, as bolstered by the other witnesses," that Ms. Ford was responsible for 31 kilograms of powder cocaine. J. A. At 1505-06.

Appellants also argue that the 100 to 1 sentencing ratio of cocaine base to cocaine powder violates the Equal

Protection Clause because it has a disproportionate impact on the black population. We have explicitly held, however, that this alleged disparity does not violate the Equal Protection clause. United States v. Wallace, 22 F.3d 84, 88 (4th Cir. 1994).

Appellant Anthony Merrick contends that his three prior convictions from New York should be counted as only one offense because they "were consolidated for trial or sentencing." U.S.S.G. § 4A1.2, appl. note 3. However, Merrick's prior cases were heard on the same date only because of a "backlog in New York." J.A. at 1458. The district court noted that the prior offenses resulted in separate convictions and separate sentences and that no order of consolidation had been entered. J. A. at 1460-61. The mere fact that the cases were heard on the same day does not constitute consolidation.

Appellant Merrick also argues that the district court erred in not granting him a two point reduction for being only a minor participant in the conspiracy. Merrick argues that he was a "mere courier." However, the district court noted that Merrick "is personally responsible for 194.06 kilograms of crack cocaine, was a bodyguard carrying a firearm for the major distributor for the organization in Richmond, and furthermore, operated in this conspiracy from August of 1990 through February of 1991 , and May of 1993 through January of 1994." J.A. at 1448. The district court's conclusion was not clearly erroneous.

Finally appellant Samuel Kelly argues that his simultaneous criminal prosecution and forfeiture constitutes double jeopardy. However, review of claims of double jeopardy in a single proceeding "is limited to ensuring that the total punishment did not exceed that

authorized by the legislature." United States v. Halper, 490 U.S. 435, 450 (1989). Kelly presents no evidence that his punishment exceeded that authorized by Congress.

CONCLUSION

For the reasons stated herein, the judgment of the district court is affirmed.

AFFIRMED.